STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Pen-15-555

DAY'S AUTO BODY, INC.,

Plaintiff - Appellant

v.

TOWN OF MEDWAY, ET AL.,

Defendants - Appellees

ON APPEAL FROM AN ORDER OF THE
PENOBSCOT COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT-APPELLEE TOWN OF MEDWAY

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CASES

Maine Cases

Federal Cases

STATUTES AND LEGISLATIVE MATERIALS

Maine

RULES AND MISCELLANEOUS

Maine Rules

INTRODUCTION

By this appeal, Plaintiff/Appellee Day's Auto Body, Inc. ("Day's Auto") asks the Law Court to declare that towns are not immune from suit when they use vehicles and firefighting apparatus to fight fires. This argument contradicts both the letter and spirit of the immunity granted to governmental entities under the Maine Tort Claims Act ("the Act"). There is no exception to immunity that applies when Towns employ firefighting vehicles and apparatus to suppress a blaze. Moreover, the Maine Legislature expressly intended the Act to protect towns from liability when their employees are required to exercise judgment in emergency situations. To rule otherwise would cause towns and their employees to hesitate out of fear of being sued when action is necessary – a consequence the Legislature explicitly determined was unacceptable. The Penobscot County Superior Court (Anderson, J.) correctly determined that Defendant/Appellee Town of Medway is immune from suit with regard to Day's Auto's claims, and this Court should affirm that decision.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Day's Auto sued the Town seeking damages for the Town's actions in attempting to suppress a fire at Day's Auto's business premises. Through a motion for summary judgment, the Town claimed immunity from suit pursuant to the Maine Tort Claims Act ("the Act"). Although the Town's motion was styled a request for summary judgment, it was effectively a motion to dismiss supported by an affidavit. The Town was required to submit an affidavit (and thereby transform the motion into a request for summary judgment) in order to demonstrate that it had not waived immunity under the Act through the purchase of liability insurance.[1] 14 M.R.S. § 8116; *Doucette v. City of Lewiston*, 1997 ME 157, ¶ 10 697 A.2d 1292, 1295. In that procedural posture, the facts underlying the motion were the well-pleaded allegations in the Complaint, which were accepted as true for the purposes of that motion only.

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[1] The waiver of immunity through insurance does not appear to be an issue in this case, as Day's Auto made no argument to that effect to the Superior Court and has made no such argument to this Court. Consequently, Day's Auto is precluded from relying on that issue to challenge the summary judgment order. *See Kilmartin v. Maine Employment Sec. Comm'n*, 446 A.2d 412, 414 (Me. 1982) ("failure to raise the issue in the court below precludes this court from reaching the merits of this argument") (citations omitted); *Holland v. Sebunya*, 2000 ME 160, ¶ 9 n.6, 759 A.2d 205, 209 n.6 ("The failure to mention an issue in the brief or at argument is construed as either an abandonment or a failure to preserve that issue.") (citations omitted). Therefore, the Town does not intend to address that issue any further in this Brief.

Here the Town notes a procedural wrinkle that does not appear to affect the fabric of this case. Specifically, the Town's motion was premised upon the allegations in Day's Auto's original Complaint, which was filed with the Superior Court on October 2, 2013. (Appendix at A-1 (hereafter "A. at ____")). While the motion was pending, Day's Auto moved for leave to amend its Complaint to add an allegation to Count II – which had originally asserted a claim only against Defendant/Appellee Emery Lee and Sons, Inc. ("Emery Lee") – that the Town should be held vicariously liable for the actions of Emery Lee. (A. at A-3).

Over the Town's objection, the Superior Court apparently signed an order on February 23, 2015 granting Day's Auto leave to amend its Complaint and accepting as filed the proposed Amended Complaint that Day's Auto submitted with its motion. (A. at A-6). However, that order was not entered on the docket until March 17, 2015 – almost two weeks after the Superior Court granted the pending motions for summary judgment. *Id.*

Also on March 17, 2015, the Superior Court endorsed the February 23 Order "nunc pro tunc" – which the Town interpreted to mean that the summary judgment order issued in March 5, 2015 should be understood to grant summary judgment with regard to the claims asserted in the

Amended Complaint. *Id.* Presumably this action by the Superior Court was based on its observation that the operative allegations in both versions of the complaint were largely identical and, in any case, failed to present viable claims. Based on this series of orders, it would appear that for the purposes of this appeal, the relevant allegations are those in the Amended Complaint.[2]

The Amended Complaint alleges that the Town was "negligent in its use of vehicles, machinery, and equipment in responding to and attempting to suppress the fire" at the Plaintiff's property on October 3, 2011. (A. at A-35 (Amended Complaint ¶¶ 4 & 6 (hereafter "Amd. Compl. ¶ ____")). The Complaint specifies the "use of vehicles, machinery, and equipment" to include: unloading and charging of water hoses; inaction by "suited fire fighters"; spraying water with fire hoses; refilling fire trucks from a single fire hydrant; refusing to fill fire trucks with water from the Penobscot river; utilization of a water holding tank to hold water for fire trucks; and failing to connect a water hose from a pump truck to a nozzle. (A. at A-35 to A-37 (Amd. Compl. ¶ 6)).

In a separate count, the Amended Complaint alleges that the Town

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[2] Again, the Town does not concede that these allegations are true; rather, the Town assumes the truth of the well pleaded allegations for the purposes of the motion only.

should be held vicariously liable for Emery Lee's use of an excavator at the fire scene. (A. at A-37 (Amd. Compl. ¶ 9)). As this allegation was not part of the original Complaint, it was not part of the summary judgment record pertaining to the Town. However, the issue of Emery Lee's liability was developed by Emery Lee as part of its motion for summary judgment. To the extent that portion of the record has any relevance to the claims against the Town, the Town is prepared to assume the accuracy of that factual record for the purposes of this appeal only.[3]

As of October 3, 2011, the Town of Medway was insured under a commercial general liability policy issued by Argonaut Insurance Company bearing policy number MGL700019904 and a business automobile policy issued by Argonaut Insurance Company bearing policy number MBA700019904 ("the Argo policies"). (A. at A-80 to A-81 (DSMF ¶ 3 and Lee Aff. ¶ 3)). Apart from those Argo policies, the Town of Medway did not have any liability insurance coverage effective on October 3, 2011 that

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[3] Since the Town did not have a reason to develop a record with regard to this issue, it is assuming – without conceding – that the relationship and interactions between it and Emery Lee could give rise to "vicarious liability" in the first place. *See Estate of Fortier v. City of Lewiston*, 2010 ME 50, ¶ 15, 997 A.2d 84, 89 (holding that the Legislature intended to waive immunity only in situations where a governmental entity has some measure of direct control over the pertinent vehicle). Since the Town believes that both it and Emery Lee are entitled to immunity under the Act, the Court need not parse the nature of and basis for the alleged "vicarious liability." However, the Town does not waive any arguments or defenses that it may have with regard to that issue.

pertained to the activities of the Town fire department. (A. at A-81 (DSMF ¶ 4 and Lee Aff. ¶ 6)). Both Argo policies contain endorsements that state that the coverage the policy provides does not extend to areas in which the Town is immune under the Maine Tort Claims Act and that the insurance coverage does not effect a waiver of the immunities afforded to the Town under the Act. (A. at A-81 (DSMF ¶¶ 5 & 6 and Lee Aff. ¶¶ 4 & 5 (Exh. 1 at Endorsement AG 7341 ME (7/07); Exh. 2 at Endorsement AG 7129 (7-07)))).

The Town's motion for summary judgment was filed on or about April 18, 2014. (A. at A-3). Defendant/Appellant Emery Lee & Sons, Inc. ("Emery Lee") also requested summary judgment by a motion filed on September 2, 2014. (A. at A-4). By an order dated March 5, 2015, the Superior Court (Anderson, J.) granted the Town and Emery Lee summary judgment. (A. at A-23 to A-34). Day's Auto moved to reconsider the portion of the order granting summary judgment to Emery Lee (but no other aspect of the order). (A. at A-6). By an order entered on September 9, 2015, the Court denied the motion to reconsider. (A. at A-13 to A-22). After the defendants dismissed their cross-claims without prejudice, Day's Auto filed its notice of appeal on November 2, 2015. (A. at A-10).

STATEMENT OF ISSUES FOR REVIEW

I. Did the Town's use of vehicles and fire-fighting equipment as part of an effort to suppress a building fire fall within any exception to immunity afforded by the Maine Tort Claims Act?

II. Did the Town's efforts to suppress a fire at a resident's business constitute a discretionary function under the Maine Tort Claims Act?

LEGAL STANDARD OF REVIEW

The Law Court reviews an order granting summary judgment for legal errors. *Steeves v. Bernstein, Shur, Sawyer & Nelson, P.C.*, 1998 Me 210, ¶ 11, 718 A.2d 186, 190 (citation omitted). In doing so, the Court construes the evidence in the light most favorable to the non-moving party. *Id.* However, summary judgment should be affirmed if the factual materials on file demonstrate that there is no issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.; Rodrigue v. Rodrigue*, 1997 ME 99, ¶ 8, 694 A.2d 924, 926 (citation omitted).

Summary judgment is not an extreme remedy. *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18, 21. It is a procedural device intended to permit prompt disposition of cases in which the dispute is solely dependent on the resolution of an issue of law. *See id.*; *Berard v. McKinnis*, 1997 ME 186, ¶ 14, 699 A.2d 1148, 1153. Where a plaintiff will have the burden of proof on an essential issue at trial, and it is clear that the defendant would be entitled to a judgment as a matter of law at trial if the plaintiff presented nothing more than what was before the court at the hearing on the motion for a summary judgment, the court may properly grant a defendant's motion for a summary judgment. *See Town of Lisbon v. Thayer Corp.*, 675 A.2d 514, 517 (Me. 1996); *see also* M.R.Civ.P. 50(a). To avoid a judgment

as a matter of law for a defendant, a plaintiff must establish a *prima facie* case for each element of her cause of action. *See Fleming v. Gardner*, 658 A.2d 1074, 1076 (Me. 1995). A judgment as a matter of law in a defendant's favor is proper when any jury verdict for the plaintiff would be based on conjecture or speculation. *See id.; Barnes v. Zappia,* 658 A.2d 1086, 1089 (Me. 1995).

In determining whether to grant or deny a motion for summary judgment, the court does not look for *any* dispute of fact, but a "genuine" issue of "material" fact. *See* M.R.Civ.P. 56(c). "Material" means a contested fact that has the potential to change the outcome of the case under the governing law if the dispute is resolved favorably to the nonmoving party. *See Steinke v. Sungard Fin. Sys., Inc.,* 121 F.3d 763, 768 (1st Cir. 1997); *Burdzel v. Sobus,* 2000 ME 84, ¶ 6, 750 A.2d 573, 575. "Genuine" means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party. *See Kenny v. Dep't of Human Servs.*, 1999 ME 158, ¶ 3, 740 A.2d 560, 562; *Prescott v. State Tax Assessor*, 1998 ME 250, ¶ 5, 721 A.2d 169, 171-72 (issue is "genuine" when facts require a choice between the parties' differing versions of the truth); *Roche v. John Hancock Mut. Life Ins. Co.,* 81F.3d 249, 253 (1st Cir. 1996).

SUMMARY OF ARGUMENT

Under the Maine Tort Claims Act, governmental entity immunity is the rule, subject only to specific, limited exceptions. As such, any provision that waives immunity is narrowly construed. Since the gravamen of Day's Auto's claims against the Town is that it was negligent in extinguishing a fire that was consuming Day's Auto's garage, no specific exception to immunity applies. Therefore, the Town is immune from liability for the claims. Day's Auto's argument to the contrary is flawed because it is contrary to established precedent and it relies upon an impermissibly broad reading of exceptions to immunity.

Even if Day's Auto's claims did fall within an exception, the Town is nonetheless protected by discretionary function immunity. This immunity was expressly designed to protect governmental employees and entities from vexatious lawsuits that might curb their official actions. Moreover, contrary to Day's Auto's arguments, discretionary function immunity is not limited to policymaking decisions – it extends to any governmental activity that requires the exercise of judgment in carrying out the underlying governmental purpose. This is particularly true of actions by governmental employees in difficult or emergency situations. The Town's efforts to

extinguish the fire consuming Day's Auto's building are discretionary functions that are protected by immunity.

ARGUMENT

I. THE TOWN'S EMPLOYMENT OF VEHICLES AND APPARATUS TO FIGHT A FIRE DOES NOT FALL WITHIN ANY EXCEPTION TO IMMUNITY UNDER THE MAINE TORT CLAIMS ACT.

As indicated above, Day's Auto alleges that the Town was "negligent in its use of vehicles, machinery, and equipment in responding to and attempting to suppress the fire" at Day's Auto's business location. Tort claims against Maine municipalities are governed by the provisions of the Maine Tort Claims Act, 14 M.R.S. §§ 8101-8118 (2003 & Supp. 2015) ("the Act"). The Act provides a general grant of immunity to governmental entities, which include, by definition, towns. 14 M.R.S. § 8103. *See also* 14 M.R.S. § 8102(2 & 3) ("governmental entity" defined to include "political subdivisions" of the State, including towns).

The only exceptions to this immunity appear in 14 M.R.S. § 8104-A, which states in relevant part:

> Except as specified in section 8104-B, a governmental entity is liable for property damage, bodily injury or death in the following instances.

> 1. Ownership; maintenance or use of vehicles, machinery and equipment. A governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of any:
>
> A. Motor vehicle, as defined in Title 29-A, section 101, subsection 42;
>
> B. Special mobile equipment, as defined in Title 29-A, section 101, subsection 70;
>
> C. Trailers, as defined in Title 29-A, section 101, subsection 86;
>
> D. Aircraft, as defined in Title 6, section 3, subsection 5;
>
> E. Watercraft, as defined in Title 12, section 1872, subsection 14;
>
> F. Snowmobiles, as defined in Title 12, section 7821, subsection 5; and
>
> G. Other machinery or equipment, whether mobile or stationary.

§ 8104-A. As this Court has emphasized, in the context of governmental entity immunity "the [Act] employs an exception-to-immunity approach rather than an exception-to-liability approach." *Thompson v. Dep't of Inland Fisheries & Wildlife,* 2002 ME 78, ¶ 5, 796 A.2d 674, 676 (quotation marks omitted). As such, this Court's analysis of the issues in this case "start[s] from the premise that immunity is the rule and exceptions to immunity are to be strictly construed." *Id.* (quotation marks omitted).

Day's Auto's claims against the Town in this case do not implicate any exception to immunity. The Amended Complaint specifies the "use of vehicles, machinery, and equipment" to include: unloading and charging of water hoses; inaction by "suited fire fighters"; spraying water with fire hoses; refilling fire trucks from a single fire hydrant; refusing to fill fire trucks with water from the Penobscot river; utilization of a water holding tank to hold water for fire trucks; and failing to connect a water hose from a pump truck to a nozzle. (A. at A-35 to A-37 (Amd. Compl. ¶ 6)). In a separate count, Day's Auto alleges that the Town should be held vicariously liable for Emery Lee's operation of an excavator at the fire scene, which the summary judgment record developed by Emery Lee indicates involved efforts to control the fire. These assertions, even if true, do not state claims of negligence against the Town arising out of the "ownership, maintenance or use" of any motor vehicle, special mobile equipment, or "other machinery or equipment."[4]

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[4] The Town has briefed the issues on appeal in the order that the Superior Court and Day's Auto have addressed them. However, the Town would note that all claims against the Town in this case are barred by discretionary function immunity. *See infra* at 22-31. Since the Law Court has held that it is unnecessary to analyze whether alleged conduct falls within an exception to immunity in Section 8104-A if the conduct constitutes a discretionary act, the Court may wish to simply resolve this appeal by affirming summary judgment for the Town on the basis of discretionary fuuction immunity. *See Roberts v. State*, 1999 ME 89, ¶ 10 n.4, 731 A.2d 855, 858 n.4.

A. The non-vehicle tools and objects that the firefighters used are not "other machinery or equipment," as that term is used in the Act.

Setting aside, for the moment, the fire truck and excavator mentioned in the Amended Complaint, all other fire-fighting apparatus that Day's Auto alleges was negligently used by the Town clearly does not fall within an exception to immunity. The Amended Complaint mentions negligent use of the following items: hoses; hydrants; a holding tank; and a nozzle. These items clearly do not fall within the specifically enumerated vehicles in Section 8104-A(1)(A-F).

The listed items also do not qualify as "other machinery or equipment" under Section 8104-A(1)(G). The Law Court has held that "[i]n order for there to be liability for the negligent use or operation of 'other machinery or equipment,' we require that the risk from the negligent use of the 'other machinery or equipment' be comparable to the risk that results from the negligent use of the vehicles listed in section 8104-A(1)(A) through (F), that is, motor vehicles, special mobile equipment, trailers, aircraft, watercraft, and snowmobiles." *New Orleans Tanker Corp. v. Department of Trans.*, 1999 ME 67, ¶ 6, 728 A.2d 673, 675 (citing *J.R.M., Inc. v. City of Portland*, 669 A.2d 159, 161 (Me. 1995)). The Law Court has further held that "[t]he major risk from the negligent use of vehicles with

the power to move is that they will be driven or transported in locations where the general public is exposed to the possibility of a collision and resulting harm." *Id.* ¶ 9, 728 A.2d at 676. Consistent with this interpretation of Section 8104-A(G), the Law Court has held that a wide variety of items do not constitute "other machinery or equipment" including: a hypodermic syringe;[5] train tracks;[6] a watering system on a golf course;[7] a fire protection system;[8] a dumpster;[9] and bridge leaf machinery.[10]

The various items Day's Auto alleges were negligently used by the Town do not implicate by their use risks comparable to the risk that results from the negligent use of the vehicles listed in section 8104-A(1)(A) through (F). The general public simply does not come in contact with hoses, hydrants, holding tanks, and a nozzle in the same way that the public comes in contact with the governmental vehicles enumerated in Section

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[5] *McNally v. Freeport*, 414 A.2d 904, 906 (Me. 1980).

[6] *Harris v. City of Old Town*, 667 A.2d 611, 613 (Me. 1995).

[7] *Petillo v. City of Portland*, 657 A.2d 325, 327 (Me. 1995).

[8] *J.R.M., Inc. v. City of Portland*, 669 A.2d 159, 161 (Me. 1995).

[9] *Reid v. Town of Mt. Vernon*, 2007 ME 125, ¶ 27, 932 A.2d 539, 546.

[10] *New Orleans Tanker Corp. v. Department of Trans.*, 1999 ME 67, ¶ 14, 728 A.2d 673, 677.

8104-A(1). *New Orleans Tanker*, 1999 ME 67, ¶ 9, 728 A.2d at 676. Moreover, the items alleged in the Amended Complaint do not have the power to move on their own, would not be considered "ordinary transportation devices," and accidents involving them are not nearly as common as accidents with vehicles. *See Reid v. Town of Mt. Vernon*, 2007 ME 125, ¶ 25, 932 A.2d 539, 546. Based on the overwhelming body of law construing the "other machinery or equipment" provision, the items that the Amended Complaint alleges were negligently used (specifically, the hoses, hydrants, holding tanks, and a nozzle) do not fall within an exception to immunity.

B. The gravamen of the claims against the Town does not implicate the exceptions to immunity.

The clear gravamen of Day's Auto's Amended Complaint is that it was injured by the Town's efforts to suppress a fire at its business premises. (A. at A-35 (Amd. Compl. ¶ 6 (alleging negligence "in responding to and attempting to suppress the fire" at Day's Auto's business location))). Allegations that suggest some involvement that Town fire trucks had in the fire-fighting effort[11] do not change the focus of Day's Auto's claim, nor, for

[11] The Amended Complaint refers to unloading water hoses from a fire truck (¶ 6(a)), using a single fire hydrant to refill the fire trucks (¶ 6(d)), refusing to fill fire trucks from the Penobscot River (¶ 6(e)), improperly refilling a holding tank (¶ 6(f)), and failing to connect a hose from a pump truck (¶ 6(g)). Notably, these alleged actions were all in

that matter, do the allegations of vicarious liability based on Emery Lee's efforts to assist the Town in suppressing the fire. Therefore, to find that the claim falls within the "motor vehicle exception" or the "special mobile equipment exception" to immunity, the Court would have to read the exceptions broadly to include any incident in which a vehicle was in any way involved.

Such an expansive reading of the exceptions is contrary to the Law Court's interpretation of the Act. The Law Court has frequently held that "[e]xceptions to absolute immunity are narrowly construed." *Thompson v. Dep't of Inland Fisheries & Wildlife*, 2002 ME 78, ¶ 5, 796 A.2d 674, 676 ("The MTCA employs an 'exception to immunity' approach rather than an 'exception to liability' approach.") (internal quotations and citations omitted). For this reason, the Law Court has routinely rejected efforts to expand the exceptions through a liberal reading of their scope.

The most pertinent example of such an approach would appear to be the Court's decision in *Thompson v. Dep't of Inland Fisheries & Wildlife*, 2002 ME 78, 796 A.2d 674. The plaintiff in *Thompson* alleged that the State and various State organizations were negligent in the use of their vehicles, aircraft, snowmobiles and other machinery and equipment when

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service of the effort to suppress a fire.

they failed to coordinate their efforts to rescue him after he was injured in a serious snowmobiling accident. Specifically, the plaintiff alleged that the State was negligent in failing to sufficiently fuel a rescue helicopter and failing to maintain adequate communication and navigation equipment on that vehicle. *Id.* ¶ 6, 796 A.2d at 676. The Court rejected the plaintiff's attempt to implicate the exceptions to immunity in section 8104-A(1). *Id.* ¶ 9, 796 A.2d at 677. In doing so, the Court relied upon its precedents to emphasize that the "'major risk from the negligent use of vehicles with the power to move is that they will be driven or transported in locations where the general public is exposed to the possibility of a collision and resulting harm.'" *Id.* ¶ 7, 796 A.2d at 677 (quoting *New Orleans Tanker Corp. v. Dep't of Transp.*, 1999 ME 67, ¶ 9, 728 A.2d 673, 676). Building on that precedent, the Law Court observed: "In interpreting section 8104-A(1), therefore, the focus is on the risk of harm naturally or directly caused by the vehicle's contact with the general public." *Id.* ¶ 8, 796 A.2d at 677. Since the gravamen of the plaintiff's complaint was that he "was harmed not by contact with a negligently operated or maintained vehicle, but by the State's failure to execute an efficient rescue," the Court held that no exception to immunity applied. *Id.* ¶ 9, 796 A.2d at 677.

Similarly, in *Brooks v. Augusta Mental Health Institute*, 606 A.2d

789 (Me. 1992), the Law Court affirmed the dismissal on immunity grounds of claims asserted by a prisoner who jumped from a moving vehicle. The prisoner argued that his claims fell within the "motor vehicle exception" to the Act's immunity because he was injured while the State of Maine and the Augusta Mental Health Institute were using a vehicle to transport him. After discussing the standard of review under Maine Rule of Civil Procedure 12(b)(6) and emphasizing that exceptions to immunity are narrowly construed, the Court rejected the prisoner's attempt to characterize his allegations as stating claims under the "motor vehicle" exception:

> A careful review of the allegations of Brooks's complaint reveals that the gravamen of her claim is not the defendants' negligent operation, use or maintenance of the bus, but the monitoring and supervision of the decedent by the AMHI employees while the decedent was riding on the bus. Under no reasonable analysis of Brooks's claim would the conduct of any of the defendants amount to negligence in the ownership, maintenance or use of a motor vehicle.

Id. at 790 (citing *Jensen v. Augusta Mental Health Inst.*, 574 A.2d 885, 886 (Me. 1990); *Darling v. Augusta Mental Health Inst.*, 535 A.2d 421, 424 (Me. 1987)). *See also Lightfoot v. Sch. Admin. Dist. No. 35*, 2003 ME 24, 816 A.2d 63 (holding that public building exception did not apply to claim arising out students' use of a public high school to perform running drills

because the focus of the claim was not the operation of a public building but rather the supervision of the students' activities in the building); *ABT & A Co., Inc. v. State*, 644 A.2d 460 (Me. 1994) (holding that "[t]he State's efforts to prevent prisoners from escaping do not qualify as 'operation or maintenance of public buildings'").

Consistent with the Law Court's decisions – and particularly those in *Thompson* and *Brooks* – this Court should reject Day's Auto's efforts to implicate exceptions to immunity under Section 8104-A(1). Day's Auto did not allege that its property damage was caused by contact with the fire trucks. Rather, like the plaintiff in *Thompson*, Day's Auto is alleging that the Town negligently used items (in this case, hoses, holding tanks, etc.) and fire trucks in an effort to save his property from fire. If the State cannot be held liable for negligently failing to use its equipment and vehicles to rescue an injured snowmobiler, it necessarily follows that the Town cannot be held liable for alleged negligence in failing to preserve Day's Auto's property from fire damage. Since the gravamen of Day's Auto's claim against the Town is not that he was harmed by contact with a negligently operated or maintained fire engine (or any other similar "machinery or equipment"), the exceptions to immunity do not apply.

Finally, while Emery Lee's alleged use of the excavator (or backhoe)

presents an admittedly closer question on this issue,[12] it would appear that the logic of *Thompson* should also extend to special mobile equipment[13] that is being used solely to suppress a fire when the alleged negligence occurred. In *Thompson*, the Court held that "'the major risk from the negligent use of vehicles with the power to move is that they will be driven or transported in locations where the general public is exposed to the possibility of a collision and resulting harm.'" *Thompson*, 2002 ME 78, ¶ 7, 796 A.2d at 677 (quoting *New Orleans Tanker Corp. v. Dep't of Transp.*, 1999 ME 67, ¶ 9, 728 A.2d 673, 676). Building on that premise, the Law Court held that "[i]n interpreting section 8104-A(1), therefore, the focus is on the risk of harm naturally or directly caused by the vehicle's contact with the general public." *Id.* ¶ 8, 796 A.2d at 677.

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[12] The Town would note that this vicarious liability claim does not present a close issue with regard to discretionary function immunity. The Superior Court granted Emery Lee discretionary function immunity. The Superior Court's discussion of discretionary function immunity was both thorough and correct, as was its application of the immunity to both the Town and Emery Lee. Therefore, even if the Court concludes that the vicarious liability theory does state alleged negligence that falls within the exception to immunity under Section 8104-A(1)(2), the Town is nonetheless immune from suit by virtue of discretionary function immunity in Section 8104-B(3). *See infra* at 22-31; *see also* Emery Lee's Brief of Appellee at 21-30.

[13] Here the Town is referring only to the backhoe. Although Day's Auto seems to suggest in its Brief that a fire truck can also be considered "special mobile equipment," Maine law clearly contradicts this suggestion. *See* 29-A M.R.S. § 101(6) and § 2054(1)(B)(10) (collectively defining an "authorized emergency vehicle" to include "[a] fire department vehicle").

The use of an excavator for the specific purpose of assisting in efforts to suppress a fire does not implicate the "risk of harm naturally or directly caused by the vehicle's contact with the general public." In this sense, the excavator is functionally equivalent to the bridge leaf machinery in *Thompson* that came in contact with the plaintiff's boat and caused damage to that boat – both machines were stationary at the time of the alleged contact and neither was being used in a manner that the general public would be exposed to the possibility of a collision and resulting harm. Since the gravamen of Day's Auto's claims is that the Town was negligent in suppressing a fire, the use of vehicles that may be listed in Section 8104-A(1) does not trigger an exception to immunity. The Court should affirm the Superior Court's decision to grant the Town summary judgment.

II. MUNICIPAL FIREFIGHTING EFFORTS ARE PROTECTED FROM LIABILITY BY DISCRETIONARY FUNCTION IMMUNITY.

Despite the provisions of Section 8104-A, a governmental entity retains its immunity if the acts alleged constitute a discretionary function. 14 M.R.S.A.§ 8104-B(3); *see Doucette v. City of Lewiston*, 1997 ME 157, ¶8 n.1, 697 A.2d 1292, 1294 n.1. The pertinent provision of Section 8104-B states:

> Notwithstanding section 8104-A, a governmental entity is

> not liable for any claim which results from:
>
> ....
>
> 3. Performing discretionary function. Performing or failing to perform a discretionary function or duty, whether or not the discretion is abused and whether or not any statute, charter, ordinance, order, resolution or policy under which the discretionary function or duty is performed is valid or invalid.

§ 8104-B. The Law Court has applied Section 8104-B(3) consistent with the concept of discretionary function immunity afforded to governmental employees by 14 M.R.S. § 8111. *Roberts v. State*, 1999 ME 89, ¶ 7, 731 A.2d 855, 857.

In pertinent part, Section 8111 elaborates on the concept of discretionary function immunity as follows:

> The absolute immunity provided by paragraph C shall be applicable whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question, regardless of whether the exercise of discretion is specifically authorized by statute, charter, ordinance, order, resolution, rule or resolve and shall be available to all governmental employees, including police officers and governmental employees involved in child welfare cases, who are required to exercise judgment or discretion in performing their official duties.

§ 8111(1). Therefore, the plain language of the Act extends discretionary function immunity to "*all governmental employees*, including police officers and governmental employees involved in child welfare cases, *who are required to exercise judgment or discretion in performing their official*

duties." *Id.* (emphasis added).

When adding the quoted language in Section 8111 to the Act, the Legislature expressly articulated the intended scope of discretionary function immunity. In the statement of fact that accompanied Public Law 1987, chapter 740, the Legislature said:

> "[I]t bears emphasis that the immunities contained in Title 14, section 8111 are intended to serve important governmental purposes. Governmental officials are frequently required as part of their jobs to take actions that have serious consequences for the individuals affected. Obvious examples are actions of law enforcement officers investigating crimes and child protective workers investigating allegations of child abuse. *If these governmental officials were faced with the constant possibility of personal liability, the inevitable result would be that they would be hesitant to take necessary enforcement action and the public interest would suffer*.

L.D. 2443, Statement of Fact at 15 (113th Legis.1987) (emphasis added). *See Grossman v. Richards*, 1999 ME 9, ¶ 6, 722 A.2d 371, 373 ("Tort liability should not be imposed for conduct of a type for which the imposition of liability would substantially impair the effective performance of a discretionary function.").

The Law Court has adopted a four-part inquiry to distinguish discretionary functions from ministerial ones. In reviewing the alleged conduct, the Court must ask:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Darling v. Augusta Mental Health Inst., 535 A.2d 421, 426 (Me.1987)). If the conduct satisfies these criteria, it constitutes a discretionary act that is subject to immunity. *Roberts*, 1999 ME 89, ¶10, 731 A.2d at 857-58.

The Law Court has extended discretionary function immunity to a wide range of governmental activities. Those activities include everything from warrantless arrests,[14] to execution of a search warrant,[15] to use of police vehicles to assist citizens,[16] to use of police vehicles to respond to complaints or possible criminal conduct,[17] to police and rescue

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[14] *Creamer v. Sceviour*, 652 A.2d 110 (Me. 1995).

[15] *Jenness v. Nickerson*, 637 A.2d 1152 (Me. 1994).

[16] *Moore v. City of Lewiston*, 596 A.2d 612 (Me. 1991).

[17] *Selby v. Cumberland County*, 2002 ME 80, 796 A.2d 678; *Norton v. Hall*, 2003 ME 118, 834 A.2d 928.

dispatching,[18] to supervision of inmates,[19] to housing inspections.[20] In all of these instances, the activities were performed by non-policymakers responding to events or complaints within the scope of their official duties.

For example, in *Selby v. Cumberland County*, 2002 ME 80, 796 A.2d 678, the plaintiff, a passenger in a vehicle that fled at high speed from a sheriff's deputy, alleged that the deputy conducted a negligent pursuit of the fleeing vehicle. After observing a vehicle operating approximately 20 miles per hour over the posted speed limit, a deputy attempted to stop the vehicle and proceeded to pursue that vehicle when it failed to stop. The Law Court upheld summary judgment for the deputy and the county based on the Act's discretionary function immunity provisions. The Court observed that "[a]n act qualifies as a discretionary function if the act is essential to the realization or accomplishment of a basic governmental policy program or objective ... and 'requires the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental employee involved.'" *Id.* ¶ 7, 796 A.2d at 680 (citations omitted). The Court concluded that the enforcement of traffic laws within the County was a

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[18] *Doucette v. City of Lewiston*, 1997 ME 157, 697 A.2d 1292.

[19] *Roberts v. State*, 1999 ME 89, 731 A.2d 855.

[20] *Chiu v. City of Portland*, 2002 ME 8, 788 A.2d 183.

basic governmental objective of county government. Moreover, the deputy, as a patrol officer whose duties included enforcement of traffic laws, was required to exercise his judgment "in deciding what actions to take in the enforcement of those laws." *Id.*; *accord Norton v. Hall,* 2003 ME 118, ¶¶ 7-9, 834 A.2d 928, 931 (decisions of police officer in responding to an emergency are actions entitled to discretionary function immunity because they "serve[] the basic governmental objective of public safety"); *Roberts v. State*, 1999 ME 89, ¶ 10, 731 A.2d 855, 857-58 (decision within a correctional facility of when to order a prisoner back to his cell involved a discretionary function because it was integral to a basic governmental corrections program); *Doucette v. City of Lewiston*, 1997 ME 157, ¶ 6, 697 A.2d 1292, 1294 (decisions as to how to handle incoming emergency calls were discretionary in nature despite departmental response guidelines).

The Town is immune from suit with respect to Day's Auto's claims. All of Day's Auto's claims arise out of alleged acts or omissions by Town fire fighters to suppress a fire at Day's Auto's property. Maine law authorizes towns to establish fire departments for the purpose of fighting fires. *See* 30-A M.R.S. § 3152. The actions of fire fighters to suppress fires therefore necessarily involve a basic governmental policy, program or objective. Those actions are also essential in carrying out that policy, program or

objective. Finally, the various decisions referenced in the Complaint – where to get or store water to fight the fire, how to use the hoses in furtherance of their efforts, and when to enter a burning building – all involve an exercise of judgment and expertise. *See Norton v. Hall*, 2003 ME 118 , ¶ 9, 834 A.2d 928, 931, *overruled by statute on other grounds*, P.L. 2005, ch. 448, § 1 ("Actions taken by a law enforcement officer in response to an emergency implicate the discretionary judgment of the officer and the immunity protecting governmental entities and their employees extends to those actions."); *Selby v. Cumberland County*, 2002 ME 80, ¶ 7, 796 A.2d 678, 680 (a deputy sheriff's decision to engage in a high-speed chase is a discretionary decision to which discretionary immunity applies). The Town is therefore absolutely immune from suit with regard to Day's Auto's claims pursuant to discretionary function immunity.

While Day's Auto may attempt to characterize the actions the firefighters took to carry out these decisions as merely "operational," the firefighters' actions are no different from the actions taken by law enforcement to pursue a fleeing suspect (*Selby*), or to close a door behind an inmate (*Roberts*), or to follow up (or not follow up) on a call received by a dispatcher (*Doucette*). In each of these circumstances, Court concluded

that the governmental employee was furthering the realization of a basic governmental program through their discretionary decisions and actions, even though those decisions and actions did not involve the making of policy.

Moreover, Day's Auto's attempt to equate the firefighters' conduct in fighting a fire with the conduct at issue in *Tolliver v. Department of Transportation*, 2008 ME 83, 948 A.2d 1223 (failure to lay white edge lines on pavement as part of a construction project) and *Jorgensen v. Department of Transportation*, 2009 ME 42, 969 A.2d 912 (placement and use of signage and flaggers at a construction site) is clearly faulty. Unlike the actions at issue in *Tolliver* and *Jorgensen*, the alleged actions by the firefighters represented significant decisions as to how to carry out an undisputed governmental (as distinguished from purely private) function and policy – the prompt and safe suppression of fire that is consuming a building.[21] In addition, if firefighters are exposed to liability for taking actions to extinguish burning buildings, "*the inevitable result would be*

[21] The significance of some of those alleged decisions are perhaps more apparent than others, such as the allegation that the Town negligently failed to send a firefighter into a burning building. (Compl. ¶ 6(b)). However, alleged decisions that involved less immediate peril – such as the connection of hoses – were nonetheless integral to the firefighting effort. They too fall within discretionary function immunity. *See, e.g., Roberts*, 1999 ME 89, ¶ 10, 731 A.2d at 857-58 (holding that closing a door on an inmate's finger while trying to secure the inmate in his cell falls within discretionary

that they would be hesitant to take necessary enforcement action and the public interest would suffer." L.D. 2443, Statement of Fact at 15 (113th Legis.1987) (emphasis added).[22] The same cannot be said for the workers at issue in *Tolliver* and *Jorgensen*.

Much of Day's Auto's argument appears to be based on the premise that discretionary function immunity is limited to policymaking decisions. (Day's Auto's Brief of Appellant at 11). That premise is simply and demonstrably incorrect. The cases cited above reflect actions taken by "front line" municipal employees that – while not themselves policy-making decisions – reflect an exercise of judgment in furtherance of a basic governmental policy, program, or objective. However, even if this case law did not exist, there could be no ambiguity that the Legislature intended discretionary function immunity to protect the activities of the Town's

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function immunity).

[22] It is interesting to note that in two of the leading cases on discretionary function immunity – *Moore v. City of Lewiston*, 596 A.2d 612 (Me. 1991) and *Doucette v. City of Lewiston*, 1997 ME 157, 697 A.2d 1292 – the governmental employees were sued for *not* taking action to protect the plaintiff. *See Moore*, 596 A.2d at 616 (failing to protect a person who was walking home after a traffic stop); *Doucette*, 1997 ME 157, ¶ 6, 697 A.2d at 1294 (failing to enter call information into a national database). Following that precedent, the actions of Town's firefighters would undoubtedly constitute discretionary functions if they had simply decided that the fire was too dangerous and opted to do nothing to suppress it. It would be anomalous to suggest that by placing their lives at risk to suppress the fire the firefighters would no longer be engaged in discretionary functions.

firefighters in attempting to suppress a fire:

> [W]hile there is little dispute that discretionary immunity should be available to governmental employees in policy-making positions, the Law Court's decision in Kane v. Anderson, 509 A.2d 656 (Me. 1986), suggests that such immunity is not available to lower level government employees. Although police officers and child protective workers do not exercise policy-making functions, their jobs necessarily entail making judgment calls in difficult circumstances. Frequently, such officials have to act quickly in emergency situations. If discretionary immunity were not available, such officials might refrain from taking necessary action because of the fear of being subjected to civil liability. Accordingly, these officials should be entitled to discretionary immunity for those exercises of judgment which would be inhibited by the threat of civil liability.

L.D. 2443, Statement of Fact at 16-17 (113th Legis.1987).[23] The Court must conclude that the alleged actions taken by the Town's firefighters to suppress the fire at Day's Auto's business location fall within the ambit of discretionary function immunity.

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[23] The statement by the Legislature and this Court's numerous decisions construing the scope of discretionary function immunity demonstrate why Day's Auto's reliance on decisions from Massachusetts, Alaska and Minnesota is misplaced. In each of those cases, the courts apply an interpretation of their respective statutes that is directly contrary to the Legislature's intent and this Court's precedents. The Court should disregard those decisions from other jurisdictions as inapposite.

CONCLUSION

For the reasons discussed, the Superior Court correctly determined that the Town of Medway is immune from suit and, therefore, entitled to summary judgment on all claims that have been asserted against it. The Court should affirm that judgment.

DATED at Portland, Maine, this day, March 4, 2016.

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CERTIFICATE OF SERVICE

I, John J. Wall, III, Attorney for Appellee Town of Medway, hereby certifies that I have today served the required number of copies of the foregoing Brief for Appellees on the other parties to this appeal by mailing the same to counsel of record at the following addresses:

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